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No. 07-1025

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SUPREME COURT, U.S.

In The Supreme Court of the United States

JAMES RANDALL ROGERS,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

1.

SHOULD THIS COURT DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE GEORGIA SUPREME COURT APPLYING THAT STATE'S OWN STATUTE IN ACCORD WITH THE JURISPRUDENCE OF THIS COURT?

2.

SHOULD THIS COURT DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE STATE COURT WHICH RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS?

3.

SHOULD THIS COURT DECLINE TO GRANT CERTIORARI ON A CLAIM THAT IS NOT PROPERLY BEFORE THIS COURT?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner/Appellant, James Randall Rogers, was convicted of the murder of Grace Perry and the aggravated assault of Edith Polston. Petitioner/Appellant, (hereinafter Petitioner), was sentenced to death for the murder and ten years for aggravated assault. On direct appeal, the Georgia Supreme Court affirmed Petitioner's convictions and sentences.[1] *Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644, *cert. denied*, 107 S. Ct. 600 (1986). Petitioner thereafter filed a state habeas corpus petition alleging, *inter alia*, that he was mentally retarded. The habeas corpus court remanded Petitioner's case to Floyd County for a jury trial on the issue of Petitioner's alleged mental retardation under the procedure set forth by the Georgia Supreme Court in *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989).

Before the jury trial on Petitioner's mental retardation, Petitioner wrote a letter to the trial court asking for dismissal of the proceedings. The trial court held a hearing during which Petitioner denied being mentally retarded. The trial court found that Petitioner knowingly and voluntarily waived the

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[1] Previously, Rogers' conviction and sentence were overturned due to a disparity of women on the grand jury panel. *Rogers v. State*, 250 Ga. 652, 300 S.E.2d 490 (1983).

right to a jury trial on mental retardation. Subsequently, with new counsel, Petitioner sought to set aside the dismissal and withdrew the waiver. However, before the court ruled on the motion, Petitioner again wrote a letter seeking dismissal of the trial. The trial court again found a waiver of Petitioner's right to a mental retardation trial. On appeal, the Georgia Supreme Court held, pursuant to *Fleming v. Zant*, 259 Ga. at 691, that Petitioner's trial for a capital offense was prior to July, 1, 1988;[2] and, as such, once the habeas court found a genuine issue regarding mental retardation, the issue must be reviewed and was not subject to waiver. *Rogers v. State*, 276 Ga. 67, 575 S.E.2d 879 (2003).

Petitioner's mental retardation claim proceeded to a civil jury trial in August 2005. Following the presentation of evidence by Petitioner, and by the State, the jury returned a verdict finding Petitioner not to be mentally retarded. (Record hereinafter "R" p. 2057).

The Georgia Supreme Court affirmed the jury's verdict on November 5, 2007.

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[2] This date was set to coincide with the enactment of the amendment O.C.G.A. § 17-7-131(j) in 1988.

PART TWO

STATEMENT OF THE FACTS

The Georgia Supreme Court summarized the evidence presented by the State at Petitioner's trial as follows:

> The jury heard evidence regarding six intelligence quotient ("IQ") tests administered to Rogers during his lifetime, with scores of 78, 84, 85, 68, 66 (which, due to a mathematical error, should have been 70) and 89. Expert testimony established that IQ scores between 70 and 84, while indicating borderline intellectual functioning, do not indicate mental retardation. Additionally, there was testimony that Rogers checks out prison library books on a regular basis and is able to use the computer. Three State experts who examined Rogers opined that he is not mentally retarded; three experts for Rogers disagreed. Although evidence was adduced indicating that Rogers exhibits brain dysfunction, Rogers's own expert testified that there is no way to determine what caused the dysfunction and that a person can have brain dysfunction without being mentally retarded. This expert also testified that the use of drugs and alcohol can have a significant impact on brain function and that Rogers had reported using drugs and alcohol.

Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A MERE DISAGREEMENT WITH A DECISION OF THE GEORGIA SUPREME COURT APPLYING THAT STATE'S OWN STATUTE TO THE FACTS OF PETITIONER'S CASE IN ACCORDANCE WITH THE JURISPRUDENCE OF THIS COURT.

Petitioner urges this Court to grant certiorari to consider his claim that his execution would violate his Eighth and Fourteenth Amendment rights because he was only nineteen (19) when he committed the crime and suffered from a diminished capacity similar to that of mentally retarded individuals. Respondent submits that the instant ground of this petition for a writ of certiorari merely constitutes Petitioner's disagreement with the decision of the Georgia Supreme Court applying its own statute, O.C.G.A. § 17-7-131(a)(3), in accordance with the jurisprudence of this Court in *Atkins v. Virginia*, 536 U.S. 304, 318 (IV), 122 S. Ct. 2242 (2002). Further, the Georgia Supreme Court appropriately applied this Court's ruling in *Roper v. Simmons*, 543 U.S. 551, 574 (III) (B), 125 S. Ct. 1183 (2005), holding individuals who commit a crime under the age of eighteen may not be executed. As the Georgia Supreme Court's decision regarding these issues are in accordance with this Court's holding, Petitioner has

failed to present an issue warranting review by this Court.

Petitioner alleges he demonstrated at trial that he suffered from a diminished capacity similar to that of individuals who are mentally retarded and this "diminished capacity" prohibits his execution because it would constitute cruel and unusual punishment and violate his right to equal protection. Petitioner's attempts to circumvent his failure to prove at trial that he is mentally retarded with his current argument to this Court, however, contrary to Petitioner's assertions, there does not exist a new standard prohibiting the imposition of the death penalty because an individual has "diminished capacity."

The Georgia Supreme Court, applying the State statutory law in accord with the jurisprudence of this Court, found the following regarding Petitioner's diminished capacity argument:

> Rogers also argues that his equal protection and due process rights were violated because, due to his "organic brain damage," he has the same diminished capacities enumerated in *Atkins v. Virginia*, 536 U.S. 304, 318 (IV), 122 S. Ct. 2242 (2002), that are characteristic of a mentally retarded defendant, but he is treated differently because he does not have IQ scores under 70. However, Georgia's statutory definition of mental retardation is consistent with the clinical definitions relied upon in *Atkins*, compare *id.* at 308, n. 3 with OCGA § 17-7-131(a)(3), and, contrary to

> Rogers's contentions, there are no "hypertechnical" requirements that a defendant have certain test scores in order to be found mentally retarded. See *Stripling*, supra, 261 Ga. at 4. We conclude that Rogers's arguments in this regard are without merit.

Rogers, 282 Ga. at 660-661.

Furthermore, the Georgia Supreme Court properly applied the rulings of this Court in *Roper* when it held the following:

> Rogers's death sentence does not violate his equal protection and due process rights merely because, at age 19 when he committed the crimes, he may have possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit the imposition of the death penalty on offenders under age 18. *Roper v. Simmons*, 543 U.S. 551, 574 (III) (B) (125 S. Ct. 1183, 161 LE2d 1) (2005). That Court recognized that "a line must be drawn" and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* at 574.

Rogers, 282 Ga. at 660.

Therefore, as the Georgia Supreme Court properly applied its own statute and the jurisprudence of this Court, Petitioner's mere disagreement with the

decision of the Georgia Supreme Court presents no basis for the grant of certiorari review.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE STATE COURT WHICH RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

Petitioner asserts he was denied assistance of counsel in violation of this Court's rulings in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006) and the Sixth Amendment when the Georgia Supreme Court upheld the trial court's ruling that a pre-trial motion had to be argued by lead counsel and co-counsel instead of another member of his defense team. Respondent submits this claim rests upon adequate and independent state grounds as the Georgia Supreme Court applied state law precedent to determine this issue and does not serve as an appropriate basis for the granting of a petition for a writ of certiorari.

A. The Georgia Supreme Court's Ruling Rests Upon An Independent And Adequate State Law Ground.

During pre-trial motions a member of Petitioner's defense team stood to argue a motion, but the trial court ruled that only lead counsel and co-counsel were allowed to speak in court. Moreover, the attorney in question was allowed to remain a member of

Petitioner's defense team. In determining whether the trial court properly ruled on this issue, the Georgia Supreme Court found the following:

> We find no abuse of the trial court's discretion in the exercise of its inherent power to control court proceedings by limiting the number of attorneys permitted to speak before the court to the two attorneys appointed to Rogers. *Lynd v. State*, 262 Ga. 58, 62 (9) (a) (414 SE2d 5) (1992). Although the trial court prevented a pro bono member of Rogers's defense team from arguing certain motions, it did not prevent her from continuing to assist defense counsel. Compare *United States v. Gonzalez-Lopez*, ___ U. S. ___ (126 S. Ct. 2557, 2563, 165 LE2d 409) (2006). Rather, it merely limited argument to Rogers's lead counsel and co-counsel, both of whom were appointed two years before Rogers's trial with his full agreement and in response to his counsel's motion that, as a precautionary measure, death-qualified counsel be appointed. See Unified Appeal Procedure (II) (A) (1). Furthermore, Rogers's co-counsel, who ultimately argued the motions at issue, never intimated that he was not prepared to go forward. The record shows that he was familiar with the facts and issues involved, having the previous day conducted the expert's deposition that formed a substantial basis for the motions, and the trial court had before it the written motions

> and supporting briefs submitted by Rogers's counsel.

Rogers, 282 Ga. at 661.[3]

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *See, e.g., Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983). Therefore, as the decision by the Georgia Supreme Court clearly rests upon state law, *Lynd v. State*, 262 Ga. 58, 414 S.E.2d 5 (1992), this Court should deny certiorari to review a state court judgment resting on an adequate and independent state law ground.

B. The Georgia Supreme Court Properly Conducted A Fact Specific Application Of Settled Legal Principles.

Should this Court decide the Georgia Supreme Court's decision was not based solely upon state grounds, this Court should still decline to grant certiorari to review the decision of the Georgia Supreme Court as its fact specific decision does not

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[3] Furthermore, the trial attorney in question was not death penalty qualified under Georgia's Unified Appeal Procedure. (R. 178).

conflict with the holding of this Court in *Gonzalez-Lopez*.

The facts of *Gonzalez-Lopez* are substantially different than the facts in Petitioner's case. Mr. Gonzalez hired a private attorney, Mr. Joseph Low, from California to represent him in federal court in Missouri on criminal charges, and the Magistrate Judge eventually denied Mr. Low's *pro hac vice* request for admission based upon an erroneous ruling that Mr. Low had violated a court rule. *Gonzalez-Lopez*, 126 S. Ct. at 2560. However, in Petitioner's case, the attorney in question continued to represent Petitioner after the pre-trial motions. Furthermore, the attorneys the trial court allowed to orally argue during the pre-trial motions hearing never stated they were not prepared to go forward with the litigation of the motion, and in fact went on for many pages, including calling witnesses, in petitioning the trial court to grant their motion. (T. 758-831).

Petitioner's mere disagreement with the factual resolution of his claims by the trial court and the Georgia Supreme Court, neither lower court violating the applicable precedent of this Court, does not present a question worthy of this Court's exercise of its certiorari jurisdiction. As this claim turns solely on a review and assessment of the specific set of facts in Petitioner's case, this Court should decline to grant certiorari review.

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI AS THIS CLAIM IS NOT PROPERLY BEFORE THIS COURT AS THE GEORGIA SUPREME COURT FOUND THIS CLAIM WAS WAIVED IN THE TRIAL COURT.

Petitioner asserts that the Georgia Supreme Court erroneously dismissed his claim that the trial court improperly tried his mental retardation trial as a civil, instead of a criminal, proceeding. The record showed, however, that Petitioner waived his objection to the trial court's decision regarding this issue. Therefore, this claim is not properly before this Court for review.

Petitioner enumerates two errors with the civil procedure in which his trial was conducted: 1) Petitioner was not given the correct number of peremptory challenges; and, 2) Petitioner was made to strike first during jury selection and was denied his right to exercise the final jury strike. The Georgia Supreme Court found each of these issues was waived by Petitioner at trial.

A. The Georgia Supreme Court Found This Claim Was Waived In The Trial Court.

At trial Petitioner did not object to receiving fifteen peremptory challenges and in fact, counsel for Petitioner *informed* the State that it had fifteen challenges. (T. 713). Accordingly, the Georgia Supreme

Court found the following regarding Petitioner's claim that he was denied the correct number of peremptory challenges to the jury pool:

> Any error in the application of OCGA § 15-12-165 (State and defendant in death penalty cases each allowed 15 peremptory challenges) to Rogers's trial was invited by defense counsel and, as such, is not grounds for reversal. *Pye* [*v. State*], supra, 269 Ga. at 787 (14). See also *Madison v. State*, 281 Ga. 640, 642 (2) (c) (641 SE2d 789) (2007) (defendant not deprived of protected right by retroactive application of OCGA § 15-12-165, reducing number of peremptory strikes, as peremptory strikes are procedural and not substantive in nature).

Rogers, 282 Ga. at 662.

Similarly, Petitioner acquiesced to the trial court's ruling that Petitioner must accept or reject each juror prior to the State. (T. 712-714). On this point, the Georgia Supreme Court found the following:

> Rogers contends that the trial court erred by conducting his mental retardation trial as a civil, rather than a criminal, proceeding. See generally *Stephens v. State*, 270 Ga. 354, 356 (2) (509 SE2d 605) (1998) (*Fleming* trial is deemed part of guilt/innocence phase). Specifically, Rogers argues that the trial court erred by failing to follow OCGA § 15-12-166, which provides that in criminal cases the State must accept or reject each potential

> juror before the defendant is required to do so. However, our review of the record establishes that Rogers repeatedly reiterated that his *Fleming* trial should be conducted as a civil proceeding, that the trial court denied Rogers's request regarding the order of juror questioning based on these representations by counsel, and that Rogers then acquiesced to the trial court's ruling. Under these circumstances, we find that Rogers has waived any objection to the trial court conducting his *Fleming* trial as a civil proceeding and to the order of the exercise of his peremptory challenges. See *Pye v. State*, 269 Ga. 779, 787 (14) (505 SE2d 4) (1998) (party cannot ignore perceived error at trial, take chance on favorable verdict, and then complain on appeal).

Id. (*See* footnote 2).

This Court has held that when Petitioner fails to properly raise an issue at trial this Court will decline to grant review of this issue. *See Satterwhite v. Texas*, 486 U.S. 249, 259, 108 S. Ct. 1792 (1988); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Jacobi v. Alabama*, 187 U.S. 133, 136, 23 S. Ct. 48 (1902). Therefore, as Petitioner waived his objections to trying his case by civil procedure, he presents no issue worthy of review by this Court in the instant petition for a writ of certiorari.

B. The Georgia Supreme Court's Decision Rests On An Independent And Adequate State Ground.

Should this Court deem this issue not to be waived, this Court should also decline review as the Georgia Supreme Court's ruling on this claim is predicated upon adequate and independent state law grounds. The Georgia Supreme Court based its decision upon its holding in *Pye v. State*, 269 Ga. 779, 505 S.E.2d 4 (1998), that if a party chooses not to object at trial he cannot later complain and expect the court to find error.[4] As this Court has held on numerous occasions, a state court judgment which rests on independent and adequate state grounds presents no federal question for adjudication by this Court. *See e.g.*, *Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983). Thus, as the decision of the Georgia Supreme Court rests on adequate and independent state law grounds, this Court should deny certiorari review.

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[4] Further, the law upon which Petitioner states the trial court committed error is also state law, O.C.G.A. § 15-12-165 and 15-12-166.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

Respectfully submitted,

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